(4)

FILED
AUG 28 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2039

In The

Supreme Court of the United States

October Term, 1997

ALAN HAVIGHURST AND DOUGLAS HAVIGHURST,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Executor of the Estate of WALTER HAVIGHURST, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Butler County

PETITIONERS' REPLY BRIEF

MARTHA C. LEE
Counsel of Record
13800 Shaker Boulevard,
Suite 808
Cleveland, Ohio 44120
(216) 752-8027
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

PETITIONERS' REPLY BRIEF

Petitioners Alan W. Havighurst and Douglas A. Havighurst hereby respond to new material contained in the Briefs in Opposition filed by Respondents First National Bank of Southwestern Ohio and Miami University – namely, egregious factual inaccuracies which would mislead this Court if left unanswered.

Counsel for Miami University asserts "[c]ontrary to representations contained in petitioners' brief, P.C. p. 8, Chief Justice Thomas Moyer did not dissent from either of the Ohio Supreme Court's decision in this case." (Br. Opp., p. 2). The official reporter for the Ohio Supreme Court in fact states at 80 Ohio St. 3d 1411, 684 N.E. 2d 704, that "Moyer, C.J., dissents" with regard to the denial of jurisdiction. Similarly, at 80 Ohio St. 3d 1450, 686 N.E. 2d 276, Chief Justice Moyer's dissent with respect to the denial of the motion for reconsideration is reported. Thus, counsel for Respondent Miami baldly misrepresents a matter which is a public record published by the State of Ohio, easily available to anyone at a law library or with computer research capabilities.

Respondent Miami University further asserts (at Br. Opp., p. 12) that Petitioners are not heirs at law of Walter Havighurst and thus do not have the requisite property interest at stake to raise the "taking" without compensation issue (Question Presented II). A discrete three-page document reproduced at pages 107a-109a of the Petition for Certiorari refutes this. The original of this document, filed in Probate Court of Butler County, Ohio on March 24, 1994 at 9:51 a.m., is a part of the record in this case. This document states: "The following are decedent's

known surviving spouse and other known survivors who are or would be entitled to inherit under the statutes of descent and distribution." Listed below said caption are Walter Havighurst's ten heirs at law, including one sister, three nieces, four nephews, one grand-nephew, and one grand-niece. Petitioners are among those listed. Respondent Miami asserts that page 107a of the Petition for Certiorari shows Walter Havighurst was survived by a sister, but implies that the other nine people listed are not heirs at law according to the statutes of descent and distribution. Either Respondent did not read the full three-page document, does not understand the statutes of descent and distribution, or is engaged in yet another maneuver to mislead the Court. The Court can obtain a true copy of the document setting forth the heirs at law to assure that its significance and veracity are as stated by Petitioners.

Additionally, Miami's counsel represents to this Court that two defendants, Ruth and Sam Neff, in fact supported Respondent First National Bank's position in this litigation. (Br. Opp., p. 1) Not so. Answers filed by each of these defendants denied "for lack of knowledge that the will create[d] a charitable trust." Miami's characterization of the testimony of Dr. Heather Hogan, Petitioners' expert witness, as supportive of "the Bank's position that the trust should be fully implemented" (Br. Opp., p. 3) is equally inapposite. The testimony of Dr. Hogan did not embrace the legal question of whether or not the trust "should be fully implemented" but she in fact testified the trust could not be carried out according to its terms (T. p. 160).

Further, First National Bank's counsel emphasizes (at Br. Opp. p. 4) that the alleged "long-standing relationship" between its institution, its trust officer Dennis Walsh, and testator Walter Havighurst. It is instructive to note that an aspect of this relationship was not revealed – namely, James Robinson, counsel, and Dennis Walsh, agent of First National Bank, filed Case No. GA-2378 on June 2, 1993 in the Probate Court of Butler County, Ohio an "Application For Appointment of Guardian of Alleged Incompetent" – *viz*, Walter Havighurst – to gain control of Walter Havighurst's assets and to prevent changes to his estate plan. As these actions were hardly appropriate for a fiduciary, the guardianship was thwarted and dismissed on December 17, 1993 by Butler County Probate Court.

Counsel for Respondent First National Bank is also apparently befuddled by the heirship issue. (Br. Opp., p. 19) As one who stood in a fiduciary relationship with decedent dating back to 1987 and now acts as a fiduciary for the Executor and Trustee, counsel should have straightened out these matters by this time.

First National Bank is disingenuous when it pretends ignorance of fact and law while acting as fiduciary for the Estate and charitable trust herein in still other ways. First National Bank suggests that since two of the three statutes involved in the jury trial issue (Question Presented I) have co-existed for "nearly 150 years" (Br. Opp., p. 9), and since there has been no conflict, this should be the end of the matter. What Respondent fails to note is that that portion of Ohio Revised Code Section 2101.24 (set forth in Pet. For Cert., p. 97a) vesting concurrent jurisdiction in probate courts and general division courts regarding the subject matter of charitable trusts did not take

effect until 1990. *See: Sub. Sen. Bill No. 46, 1989 Laws of Ohio* (Baldwin's Legislative Service), at p. 5-99. Thus, as to fact situations similar to the case herein, only a short time has passed when such conflicts or cases could have arisen.

No one disputes Miami University's capacity to receive charitable donations, as Respondent Miami discusses on page 13 of its Brief in Opposition. In this case involving a charitable trust to improve relations between the United States of America and the Union of Soviet Socialist Republics, Miami did not receive an absolute gift. Miami University was one of a number of players with benefits as well as duties ("Southeastern Indiana", "Southwestern Ohio", "Oxford, Ohio citizens", First National Bank, etc. being others, as set forth in Will, attached hereto as Appendix A; their roles are noted at paragraph (d) on p. 9a, and at items 6 and 7 on p. 8a).

The court in this case found that the charitable trust could be carried out *ab initio*, thus preventing the heirs at law from immediately receiving the trust's corpus. Had the Court left it at that, the decision would have been constitutional, though subject to legal challenge on other grounds. It is only when the Court *went further* and extinguished the reversionary interests of the heirs which would arise *in futuro* on the failure of the charitable trust that an unconstitutional "taking" of property interests by the court order to the benefit of the court-designated beneficiary, Miami University, occurred. That the failure of a charitable trust can occur with the heirs entitled to succeed to the trust corpus is well demonstrated by *Evans v. Abney*, 396 U.S. 435 (1970).

The misrepresentations of Respondents' counsel regarding factual issues is egregious here in that First National Bank is an Ohio trust company acting as a fiduciary, and counsel for Respondent Miami University is a part-time "special counsel" acting as an agent for the State of Ohio. In these regards, the credibility of the State of Ohio before this Honorable Court is put in question where the penchant for inaccuracy rises to such a high level.

For the above reasons, and those included in the Petition for Writ of Certiorari, Petitioners Alan W. Havighurst and Douglas W. Havighurst respectfully pray that a Writ of Certiorari to the Court of Appeals of Ohio, Butler County, be granted.

Respectfully submitted,

MARTHA C. LEE
Counsel of Record for Petitioners
Alan W. Havighurst and
Douglas A. Havighurst

13800 Shaker Boulevard,
Suite 808
Cleveland, Ohio 44120
(216) 752-8027

APPENDIX A – LAST WILL AND TESTAMENT OF WALTER E. HAVIGHURST AND CODICIL THERETO, EXHIBIT A TO THE COMPLAINT

Exhibit A, 94-0175
FILED 94 FEB 11 PM 12:15
Butler County Probate Court,
Judge Stephen Powell

LAST WILL AND TESTAMENT OF WALTER E. HAVIGHURST

I, WALTER E. HAVIGHURST of Butler County, Ohio, being of lawful age and of sound and disposing mind and memory, and under no undue influence, do make, publish and declare this as and for my Last Will and Testament, hereby revoking any and all Wills and Codicils thereto by me heretofore made, as follows:

ITEM I: I direct that all my legally enforceable debts, the costs of administration of my estate, and my funeral expenses, including the cost of a suitable monument at my grave, be paid out of my estate.

ITEM II: I direct my fiduciary to pay and charge to the principal of my estate, all estate, inheritance and succession taxes, State and Federal, levied or assessed in whole or in part with respect to property, including insurance, which does not come into the possession of my fiduciary; and I hereby waive on behalf of my estate any right to recover, and I direct my fiduciary not to seek to recover, any part of such taxes so paid from any beneficiary under this Will or from any other person receiving any property or insurance which is included, in whole or in part, in my gross taxable estate.

ITEM III. A. I give and devise all of the real property I may own, or have an interest in at the time of my death, to Miami University, Oxford, Ohio. This bequest is unrestricted and the Board of Trustees may use and expend the same for the benefit of the University in any manner it deems appropriate.

B. To the individuals and institutions listed below, I give and bequeath the following:

1. To MIAMI UNIVERSITY, Oxford, Ohio any and all books owned by me at my death;

2. To MIAMI UNIVERSITY, Oxford, Ohio all of my papers, letters, manuscripts, and other items of literary interest. It is my desire that such items be placed in THE KING LIBRARY of MIAMI UNIVERSITY.

3. To SAMUEL NEFF, now residing in Richmond, Indiana, if he survives me, any automobile, typewriters, and luggage, owned by me at my death.

4. To MIAMI UNIVERSITY, Oxford, Ohio, my Hodgin painting of Fisher Hall, presently hanging in my study, if owned by me at my death. It is my desire that said painting be placed in the Joseph M. Bachelor Room of Bachelor Hall, Miami University, Oxford, Ohio.

5. To my niece, RUTH NEFF, now residing in Richmond, Indiana, if she survives me, all furniture, appliances, rugs, draperies, silver, china, crystal, art objects, decorative pieces, and all other furnishings and items for household use, located in my residence at the time of my death.

6. To GOODWILL INDUSTRIES, all men's clothing which I own at the time of my death.

C. I give and bequeath to each of the following individuals as follows:

1. $100,000 to my sister, Mrs. MIRIAM HAVIGHURST JOHNSON, if she survives me;

2. $25,000 to BRUCE J. HAVIGHURST, now residing at 20861 Byron Road, Shaker Heights, Ohio 44122, if he survives me;

3. $25,000 to DOUGLAS A. HAVIGHURST, now residing at 1151 Haselton Road, Shaker Heights, Ohio 44121, if he survives me.

4. $25,000 to ALLAN W. HAVIGHURST, now residing at 3071 Huntington Road, Shaker Heights, Ohio 44120, if he survives me

5. $25,000 to WALTER E. HAVIGHURST, now residing at 338 West 47 Street, New York, New York, 10024, if he survives me;

6. $25,000 to JAMES P. HAVIGHURST, now residing at 52 Rapaki Road, Christchurch, New Zealand, if he survives me.

7. $25,000 to RUTH NEFF, now residing at 329 SW First Street, Richmond, Indiana 47374, if she survives me;

D. I give and bequeath to my niece, HELEN BERK, now residing at 2301 Cheryl Drive, Jacksonville, Florida 32017, if she survives me, the sum of $5,000.00.

E. If DOUGLAS A. WILSON and SUSAN WILSON, or either of them or their estates, or their beneficiaries thereof, should be indebted to me at my death, as evidenced by a note and a second mortgage executed by them and delivered to me, in the face amount of $50,000, or any renewals thereof, I direct and require that all of such indebtedness and all interest thereon be forgiven and canceled in its entirety, it being my intention by the bequest to relieve said DOUGLAS O. WILSON and SUSAN WILSON, or either of them, or their estates, or their beneficiaries thereof of any obligation to repay said indebtedness, or any part thereof, or any interest thereon.

F. I give and bequeath the sum of $250,000 to MIAMI UNIVERSITY, Oxford, Ohio to be used by Miami University as an endowment for the Special Collections Library, for enhancing its holdings.

G. All the rest, residue and remainder of my estate, of whatever nature and wherever situated, which I own at the time of my death, I give, devise and bequeath to THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Monroe, Ohio, IN TRUST NEVERTHELESS, for the following uses and purposes and under the following terms and conditions:

(a). I do hereby confer on my Trustee all of the powers which are now or may hereafter be conferred by law upon trustees, and in addition thereto, my said Trustee shall have full power and authority to perform the following:

1. To retain any investment, securities, or other property in my estate in the same form as received by said Trustee without liability for loss or depreciation,

resulting from such retention, regardless of the percentage of my estate represented by such an asset or assets.

2. To sell, transfer, assign, convey, exchange, lease (irrespective of the period of the trust), mortgage or otherwise dispose of any property, either real or personal, which may now or hereafter constitute a part of the trust estate, at public or private sale, without order of court and for such prices and upon such terms and conditions as my said Trustee may deem advisable, and no purchaser need look to the application of the purchase money.

3. To invest and reinvest any moneys in my estate, investments or property as my Trustee deems best, without being subject to investment restrictions, statutory, judicial or otherwise.

4. In the event that my trust estate includes real estate, to improve, insure, manage and otherwise handle said real estate as my Trustee deems advisable, and to expend part of the corpus of said trust for such purposes.

5. In the event of distribution of my estate, to distribute any of the property in kind as my Trustee deems advisable, and to place a valuation on any such property or security to be distributed; any value so placed upon such property shall be final, binding, and conclusive.

6. To compromise any and all claims in favor of or against my estate, as my Trustee deems advisable.

7. To execute and deliver such corporate proxies and consent to such corporation mergers and changes as my Trustee deems advisable.

8. To collect all income, and to determine whether money or property coming into said trust estate shall be treated as principal or income; to pay all necessary expenses; and to charge such expenses, gains, or losses to principal or income as said Trustee may deem just and equitable.

9. To deduct, retain and reimburse itself for such costs, charges, taxes, damages and expense as it may have paid or have been put to by reason thereof.

10. To make, execute and deliver any and all deeds, assignments, conveyances, powers of attorney, proxies and such other instruments, contracts, and agreements, as may be necessary or proper to carry out the powers herein granted my Trustee all of which may be exercised by said Trustee without the order or approval of any court.

11. To take and to hold all securities and other property in bearer form, in my Trustee's own name or the names of any nominees, or the name of a nominee, without disclosing any fiduciary relationship, if my Trustee deems such action wise.

12. To employ or consult with such agents, advisors, and legal counsel, as my Trustee in its sole discretion deem advisable in connection with its duties hereunder and to determine and pay such persons, firms, or corporations the reasonable value of their services.

(b) The income of my trust estate, and the principal if need be, shall be used by my Trustee to promote and fund educational projects through the Miami University International Center, Oxford, Ohio, for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics. The President of Miami University, Oxford, Ohio, or his or her designee, shall have the sole discretion to determine the nature of said projects, within the guidelines set forth below, and to determine the amounts necessary to fund said projects.

1. Funding and promoting presentations to members of the general public on the Soviet Union;

2. Funding and promoting classes and presentations to Miami University students and children on various aspects of Soviet life;

3. Funding and promoting groups and classes for Miami University students and adults on Soviet-American relations and contemporary Soviet society;

4. Funding and promoting presentations, seminars, and studies on relations between the governments of the United States and the Soviet Union;

5. Funding and promoting programs and classes dealing with conflict relationships at the international level;

6. Funding and promoting Miami University student, and group trips by members of the Oxford, Ohio community to the Soviet Union through a "sister city" program, according to guidelines set forth by Sister Cities International, Washington, D.C.;

7. Funding and promoting group trips to the Soviet Union to allow Miami University students, Oxford, Ohio citizens, and other Americans to meet and establish direct contact with municipal officials, industrial workers, educators, students, medical, legal, and other professionals, agriculturists, and creative artists;

8. To promote and fund exchanges of children's artwork between Soviet and American children and to promote and to fund consultative services to municipalities and groups wishing to establish direct contact with Soviet people and their counterparts;

9. To establish and fund an endowed professorship of Soviet-American Relations at Miami University, Oxford, Ohio.

(c) This trust fund shall be referred to as the WALTER E. HAVIGHURST FUND.

(d) It is contemplated that the trust income and principal, if needed, shall be used, at least initially, to fund and promote the projects listed in (b) above, primarily in Southwestern Ohio

and Southeastern Indiana. However, my trustee shall have the authority to fund such projects anywhere in the United States, if they are in keeping with the overall purposes of this trust and if pursuant to instructions given to it by the President of Miami University, Oxford, Ohio.

(e) I request that RUTH NEFF and SAMUEL NEFF, now residing in Richmond, Indiana, by [sic] utilized as consultants to the President of Miami University, Oxford, Ohio, for the purposes of providing suggestions and advice on ways that the above projects might be accomplished, although the ultimate decisions shall remain with said President.

(f) As set forth above, all determinations regarding expenditures of funds shall be made by the President of Miami University, Oxford, Ohio, or his or her designee. My Trustee shall be relieved of any and all liability from or responsibility for the decisions made by said President.

ITEM IV: I nominate THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO as Executor of this my Last Will and Testament, and request that it be required to give no bond for the performance of its duties as such or otherwise.

ITEM V: My fiduciary shall have full power and authority to retain any investments in my estate in the same form as received by said fiduciary; to borrow, sell, transfer, dispose of, assign, mortgage, lease as lessee, lease as lessor, and convey any property, investments, or securities held by said fiduciary without notice, advertisement, appraisement, valuation or court order or other legal formality, at public or private sale, for such amount

and on such terms as my fiduciary may deem advisable; and to execute and deliver all legal documents required. My fiduciary shall also have full power and authority to invest and reinvest any moneys in my fiduciary's hands and to change investments, in such investments, securities or property as my fiduciary deems best without regard to the statutes of any state or the rules of any court relating to investments by fiduciaries. No purchaser need look to the application of the purchase money.

My fiduciary is empowered to employ accountants, attorneys, and such agents as my said fiduciary may deem advisable; to pay reasonable compensation for their services; and to charge same to income or principal as my said fiduciary may deem proper.

My said fiduciary, in said fiduciary's sole discretion, is authorized to make such elections as may be called for in the administration of my estate, specifically to include those which may arise under the Internal Revenue Code of the United States: and said fiduciary's discretion in such elections shall be binding on all concerned.

My said fiduciary has the right, without court order or other legal formality, to compromise any and all claims in favor of or against my estate as said fiduciary may deem proper. Further, my fiduciary shall have the authority to prepare and file my income tax return, Federal, State, and City, either as a joint return or as a separate return; and to pay the appropriate tax out of my estate.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 7th day of September, 1988, in the presence of the undersigned witnesses.

/s/ WALTER E. HAVINGHURST

Signed, published and declared by WALTER E. HAVIGHURST, the Testator, as and for his Last Will and Testament, in the presence of the undersigned witnesses, who at his request, in his presence and in the presence of each other, signed the same as witnesses on the day and year last above mention.

/s/ Leslie R. Haid /s/ Judith L. Fairburn

STATE OF OHIO
COUNTY OF BUTLER

We, the testator and the witnesses whose names are signed to the attached or foregoing instrument, being first duly sworn, declare that while we were all in the presence of each other, the testator declared and signed the instrument as his Last Will; that each witness saw the testator sign the instrument and heard him acknowledge it as his Last Will; that he signed willingly as his voluntary act for the purposes therein expressed; and that each of the witnesses at the request of the testator, in the presence and hearing of the testator and of each other, signed the Will as a witness; and that each witness believes the testator was at that time 18 or more years of age, of sound mind and memory, and under no constraint or undue influence.

/s/ Walter E. Havighurst
Testator
/s/ Leslie R. Haid, Witness
/s/ Judith L. Fairburn, Witness

Subscribed, sworn to and acknowledged before me by WALTER E. HAVIGHURST, Testator, and subscribed and sworn to before me by /s/ Leslie R. Haid and /s/ Judith L. Fairburn, witnesses, this 7th day of September, 1989.

/s/ James G. Robinson
Notary Public

Prepared by:
James G. Robinson
Attorney at Law
Park Place West
Oxford, Ohio 45056

94-0175
Filed 94 FEB 11 PM
12:15 Butler County
Probate Court
Judge Stephen Powell

CODICIL
TO THE LAST WILL AND TESTAMENT OF WALTER E. HAVIGHURST

I, WALTER E. HAVIGHURST, of Butler County, Ohio, being of sound mind and memory and not under any restraint, having made my Last Will and Testament on September 8, 1988, do make, publish and declare this as and for a Codicil to my said Last Will and Testament as follows:

I wish to change the spelling of Allan W. Havighurst's name in ITEM III, C., 4., to read as follows:

4. $25,000 to ALAN W. HAVIGHURST, now residing at 3071 Huntington Road, Shaker Heights, Ohio 44120, if he survives me.

I also wish to add another provision to ITEM III, C., to read as follows:

8. $25,000 to DOROTHY H. KUCERA, now residing at 9310 Hamlin Avenue, Evanston, Illinois 60203, if she survives me.

In all respects, I hereby ratify and confirm my said Last Will and Testament, including all other paragraphs and provisions in ITEM III.

IN WITNESS WHEREOF, I have hereunto set my hand at Hamilton, Ohio, this 11th day of October, 1989, in the presence of the undersigned witnesses.

/s/ WALTER E. HAVIGHURST

Signed, published and declared by the Testator, Walter E. Havighurst, as and for a Codicil to his Last Will and Testament, in our presence who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses at the time and place aforesaid.

/s/ Michael Goosey
/s/ Sandra K. Johnson

Subscribed, sworn to and acknowledged before me by WALTER E. HAVIGHURST, the Testator, and by Michael Goosey and Sandra K. Johnson, witnesses, this 11th day of October, 1989.

/s/ James G. Robinson
Notary Public

James G.Robinson, Attorney at Law
Notary Public-State of Ohio

My commission has no expiration
date. Section 147.03 R.C.